IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.600 OF 1989

Shaikh Latif Shaikh Yakub ...Appellant

Vs.

The State of Maharashtra ...Respondent

Shri Murtaza M. Najmi, Advocate appointed for the Appellant.

Shri U.V.Nikam, A.P.P. for the Respondent.

CORAM : A.S. OKA, J.

DATE : SEPTEMBER 09/11/12, 2006.

JUDGMENT:

1. Heard the submissions of the learned Advocates appearing for the parties. By this Appeal, the Appellant has taken exception to judgment and order dated 03rd August, 1989 passed by the learned Additional Sessions Judge, Pune by which the Appellant was convicted of offence punishable under section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the said Act). The Appellant was sentenced to undergo rigorous imprisonment for ten years. He was sentenced to pay fine of Rs.01,00,000/- and in default, to suffer rigorous imprisonment for two years.

2. With a view to appreciate the submissions made by the learned counsel appearing for the parties, it will be necessary to refer to the case of the prosecution. One Shri Sunil Temkar (P.W.2), Sub-Inspector of Police attached to Vigilance Crime Branch, Pune on 01st September, 1988 at about 6.30 p.m. received a reliable information that one Latif was possessing and selling brown sugar in Ashok Nagar Hutment, Flood Affected Colony. He reduced the information in writing and informed his immediate superior Officer. The Inspector of Police of Vigilance Branch, Pune directed him to conduct the raid. He called two panch witnesses. The panch witnesses took personal search of the police staff who were to accompany the said Shri Sunil Temkar at the time of raid. The police staff took personal search of the panch witnesses and nothing incriminating was found. The police staff and panch witnesses went to Khadak Police Station in a police jeep. They took implements of sealing and weighing alongwith them . At Khadak Police Station, P.S.I. Sunil made entry in the station diary about the raid and thereafter the police party proceeded to the spot. They stopped their vehicle near a hotel known as "Nukkad". The P.S.I. Sunil asked the Police Head Constable Shri

Patil to go to the spot as per the information received and to ascertain whether any person was there as per the information received. Shri Patil went to the spot and found that the person was very much there. Thereafter, the police formed groups and proceeded towards spot and found the accused (Appellant herein) standing under a street light. The P.S.I. Sunil apprehended him and disclosed the ground on which he was apprehended. The Appellant was made aware of his rights under sub-section 1 of section 50 of the said Act. On personal search of the Appellant being taken, it was found that he was carrying one polythene bag containing brown sugar in the right hand side pocket of his trouser. A sum of Rs.105/- was found in left hand side pocket of his trouser. The packet was opened and it was confirmed that it was brown sugar. It was weighed and the weight was found to be 6 gram. Thereafter, it was wrapped in rough paper and was sealed and a panchnama was drawn.

3. The learned Advocate appearing for the Appellant has made detailed submissions. His first submission is that there is nothing on record to show that any writing was taken from the Appellant to the effect that he has been informed of his right to be searched

in presence of a Magistrate or Gazetted Officer and that the Appellant has waived the said right. He placed reliance on a decision reported in **1996 Criminal Law Journal Page 3996 (State of Punjab Vs. Labh Singh etc.)**. He submitted that it has not come in evidence that the packet which was sealed contained the signature or thumb mark of the Appellant. He submitted that thus there was a violation of section 51 of the said Act. He submitted that the provisions of the Code of Criminal Procedure, 1973 were otherwise applicable to the searches and seizures under the said Act in view of provisions of section 51 of the said Act. He submitted that a copy of recovery memo was not provided to the Appellant. He placed reliance on a decision reported in **2005 Criminal Law Journal Page 3019 (Govind Bajpayee & Anr. Vs. State of U.P. & Anr.)**. He submitted that the packet containing contraband was not re-sealed at the Police Station. He placed reliance on decision reported in **2002 Criminal Law Journal Page 4502 (Koyappakalathil Ahamed Koya Vs. A.S. Menon & Anr.)**

4. He submitted that the weight of the contraband alongwith the polythene bag was found to be 6 gms. and there was nothing on record to show the exact

weight of the bag or the wrapper. He submitted that the contraband is not weighed separately and it is weighed alongwith the plastic bag or wrapper. He placed reliance on the decision of Division Bench of this Court reported in **1993 Criminal Law Journal Page 2818 (Ashok Asumal Bajaj Vs. State of Maharashtra)**. He submitted that even the report of the Chemical Analyser was silent about the exact weight of the powder allegedly seized from the Appellant. He submitted that there was non compliance with section 57 of the said Act as report was not produced though concern witness had shown willingness to produce the report. He submitted that the report which is sent to the remand court alongwith the seized property and accused on the date of arrest is not produced and marked as an exhibit in the case. He also invited my attention to the fact that there was a delay of four days in sending the alleged brown sugar powder to the Chemical Analyser. He submitted that there was a delay of about nine months in sending seized powder to the court and the said delay was fatal to the prosecution case. He submitted that assuming without admitting that brown sugar was found in the custody of

the Appellant, section 27 of the said Act will apply.

5. The learned A.P.P. has invited my attention to evidence of various witnesses. It is submitted that considering very small quantity of brown sugar there was partical difficulty in weighing the same separately. He submitted that section 27 of the said Act will not be attracted as no case was made out by the Appellant that the brown sugar allegedly recovered from him was for his personal consumption. He placed reliance on decision of the Apex Court in the case of **Krishna Kanwar(Smt) Alias Thakuraeen Vs. State of Rajasthan reported in (2004) 2 Supreme Court Cases Page 608**. He pointed out that at the relevant time the specified small quantity was 250 mg and therefore by no stretch of imagination the quantity of brown sugar found in the present case can be said to be of a small quantity. He submitted that the case of the prosecution was clearly proved by oral and documentary evidence on record and no interference was called for.

6. I have carefully considered the submissions. It will be necessary to refer to the evidence of P.W.2 Shri Sunil Temkar. He has stated that on 01st September, 1988 at about 6.30 p.m. he received a reliable information that accused by the name Latif was possessing and selling brown sugar in Ashok Nagar

hutment in Flood Affected Colony. According to him, he reduced the same in writing and informed his superior Officer about the said information. The information reduced by him in writing has been proved in evidence and has been marked Exhibit 9. On the said document at Exhibit 9 there is an endorsement by the superior Officer directing him to conduct the raid. Thereafter, he disclosed in evidence various steps taken by him prior to the raid. He has described as to how the police party went to the spot. He stated that after apprehending the Appellant he asked the Appellant whether the Appellant was desirous of taking search of the raiding party and the panch witnesses. According to him the Appellant refused. According to him he also asked the Appellant whether the Appellant was desirous of being searched in presence of a Special Executive Magistrate or Gazetted Officer. He stated that even this was declined by the Appellant. Thereafter, he took personal search of the Appellant when a polythene bag containing brown sugar was found in the right hand side pocket of his trouser and cash of Rs.105/- was found in the left hand side pocket of the trouser. He stated that he opened the polythene bag from one of the corners and confirmed the powder contained in the same was of brown sugar.

He stated that he weighed the same and found its weight to be 6 gms. Then he described about the further procedure of wrapping the packet, sealing the packet etc. He stated that on both the sides of the packet there were signatures made of panch witnesses and himself. He also proved the panchnama drawn by him bearing his signature. He stated that he lodged the complaint and he proved the complaint in his evidence. He was cross-examined by the Advocate appearing for the accused. It is pertinent to note that in the cross-examination no suggestion was given to him that he failed to bring to the notice of the Appellant the right of the Appellant under sub-section 1 of section 50 of the said Act of being searched in presence of a Magistrate or Gazetted Officer. No cross-examination is made about the statement made by the P.W.2 regarding compliance with sub-section 1 of section 50 and regarding the refusal of the Appellant to exercise the option of being searched before the Magistrate or Gazetted Officer. Nothing important has come out on record in the cross-examination of P.W.2.

7. P.W.1 Shri Rajendra Kadre is one of the panch witnesses. He stated that two policemen in civil dress met himself and his friend Shri Sharad More when

they were wandering in camp area. The said policemen called them in office of vigilance where a police sub-inspector disclosed to them that they have to go to Ashok Nagar where one person by name Latif was dealing with brown sugar. He has described the manner in which he alongwith the other pancha witness took personal search of the said Police Sub-Inspector and police staff in which some amounts and identity cards were found. He has stated that by a police van, the police personnel and the witnesses went to Khadak Police Station. Police Sub-Inspector made an entry in one register. Thereafter, the entire party went near "Nukkad" hotel. The P.S.I. deputed one constable in civil dress to ascertain whether the accused person was standing there. Thereafter the entire party went towards that person. The witness proceeded further to state as under:

> "The P.S.I. offered personal search of himself and ours but the said person refused. Thereafter, the P.S.I. inquired with the said person as to whether his personal search is to be conducted before Magistrate or Gazetted officer and the said person refused. Thereafter, the P.S.I. took search of the

said person. In the search, the P.S.I. found one plastic packet in right pocket."

He thereafter described the manner in which the contraband was sealed and panchnama was written and signed. The witness was extensively cross-examined. It is pertinent to note that in the cross-examination no suggestion was given that the case made out in the examination-in-chief that the P.S.I. made the Appellant aware about his rights under sub-section 1 of section 50 of the said Act was false or incorrect. The panchnama was admitted in evidence during the course of his deposition.

8. P.W.3 is Maruti Kondiba Chahayal was attached at the relevant time to Khadak Police Station. He stated that after the raid he visited the spot and recorded statements of Head Constable Patil and Shinde who were members of the raiding party. There is nothing particular and relevant brought on record in his cross-examination. P.W.4 is one V.G. Nanajkar who was at the relevant time attached to Khadak Police Station at Pune. He stated that he made an entry of the receipt of the property seized in the raid in the muddemal register. He produced original muddemal

register. It is stated that he forwarded the sealed packet containing brown sugar to the Chemical Analyser on 05th September, 1988. He stated that he himself carried the sealed packet to the office of the Chemical Analyser. He stated that he received sample packet from the Chemical Analyser on 31st October, 1988 and he produced the same in the court of Judicial Magistrate on 17th July, 1989. He stated in the cross-examination that he had no idea about what was the material in the packet carried by him.

9. P.W.1 Shri Kadre and P.W.2 Shri Temkar have stated that the Appellant was made aware of his rights under sub-section 1 of section 50 of the said Act of being searched in presence of a Magistrate or a Gazetted Officer and the Appellant refused to exercise the said rights. As stated earlier, there is no cross-examination of the said witnesses on this aspect and there is no challenge to the factual statements made by the said witnesses in the examination-in-chief. Apart from evidence of P.W.1 and P.W.2, even the panchnama at Exhibit 7 records the fact that the Appellant was made aware of his rights under sub-section 1 section 50 of the said Act. The contention the Advocate for the Appellant is that a

writing ought to have been taken from the Appellant that he has been informed about his rights and that he has declined to exercise the right. On this point, the decision of the Apex Court in the case of Krishna Kanwar vs. State of Rajasthan [(2004)2 Supreme Court Caes Page 608] is relevant. In paragraph No.23 of the said decision, the Apex Court held that no specific words are required to be used or necessary to be used to convey the existence of right to the accused persons. In paragraph No.21 the Apex Court has held thus:

> "21. It is not disputed that there is no specific form prescribed or intended for conveying the information required to be given under Section 50. What is necessary is that the accused (suspect) should be made aware of existence of his right to be searched in the presence of one of the officers named in the section itself. Since no specific mode or manner is prescribed or intended, the court has to see the substance and not the form of intimation. Whether the requirements of Section 50 have been met is a question which is to be decided on the facts of each case and

there cannot be any sweeping generalization

and/or a straitjacket formula."

The Apex Court has thus held that the requirement of the statute is that the suspect should be made aware of the existence of the right and no specific mode or manner is prescribed or intended, the court has to see the substance and not the form of intimation. The Apex Court held that the question of compliance with requirement of section 50 has to be decided on the facts of each case. As stated earlier, the compliance is reflected from the evidence of P.W.1, P.W.2 and the panchnama and there is no challenge to the said aspect in the cross-examination of the P.W.1 and P.W.2. If these are the factual aspects of the case, there is no reason to discard the case made out by the prosecution that there was a compliance. The reliance placed on the judgment reported in 1996 Criminal Law Journal Page 3996 will not help the Appellant in the light of the what has been held by the Apex Court.

10. The second point is regarding violation of section 51 of the said Act on the ground that the sealed packet did not bear the signature or thumb mark to the accused and a copy of the recovery memo was not

given to the accused. In the present case, the panchnama has been duly proved in evidence by examining a panch witness. The seizure of the contraband is also established in evidence of P.W.1 and P.W.2. Reliance was placed on the decision of this court reported in **2002 Criminal Law Journal Page 4052 (Koyappakalathil Ahamed Koya Vs. A.S. Menon & Anr.)**. The said Judgment cannot be read as an authority for the proposition that the conviction is vitiated if sealed packet of the contraband was not re-sealed at the Police Station. In the present case the evidence on record shows that the sealed packet itself was sent for examination to the Chemical Analyser. Reliance is placed on a decision of the learned single Judge of Allahbad High Court reported in **2005 Criminal Law Journal 2741 (Mathura Prasad Vs. State of U.P.)**. This case cannot be read as laying down ratio that every violation of section 51 of the said Act is fatal to the conviction. As stated earlier the seizure of the contraband i.e. brown sugar from the person of the Appellant has been established on evidence.

11. Another contention raised by the learned Advocate for the Appellant is that weight of the brown

sugar including the polythene bag or packet containing brown sugar was found to be 6 gms. He submitted that since weight of the bag or packet is not separately taken, case will be governed by section 27 of the said Act. He submitted that even the sentence under section 20 of the said Act can be for a maximum a period of six months. It is pertinent to note that small quantity of heroine is 5 gms under the notification issued in the year 1996. It is not in dispute that at the relevant time, the small quantity was 250 mg. Therefore, the brown sugar possessed by the Appellant was certainly of more weight than a small quantity.

12. Reliance was placed on decision of the Division Bench of this Court reported in **1993 Criminal Law Journal Page 2818 (Ashok Asumal Bajaj Vs. State of Maharashtra)**. In the paragraph No.3 of the decision of the Division Bench held thus:

> "3. In the present case, we do concede that there are practical difficulties in the way of the authorities in the matter of transferring the powder separately and thereafter ascertaining the exact weight of the powder.

> In the absence of the paper in which it is wrapped. To our mind, it is not impossible. All that the officer is required to do is to ascertain the total weight, thereafter ascertain the weight of the wrappers and if these two are accurately recorded, the difference between them would certainly indicate the exact quantity and weight of the powder that was contained in the wrappers. It is not only desirable but essential that such a procedure be adhered to as otherwise a Court would find it difficult as in the present case to hold that the quantity involved is not within the ambit prescribed by S.27."

In paragraph No.5, the Division Bench proceeded to observed thus:

> " In our considered view, once it has been pleaded that the small quantity that was found in possession of the accused is for personal consumption, it is open to the defence to contend that the burden of proof can be adequately discharged also from the facts, circumtances and material on record. In the

present case, we do find that the quantity in each of the Pudis was undoubtedly extremely small, it was also measured out into eight small packets and there was no money found on the person of the accused which could possibly have been construced as being evidence of sale or distribution. The investigation did not indicate that the accused either himself or as agent of some other person was drug peddler. In the absence of such material, and the fact that the drug was found in extremely small measured quantities would be sufficient for the purposes of indicating that it was for the personal consumption of the accused".

13. In the present case, at no stage, a case was made out that the powder which was found in personal search of the Appellant was for personal consumption. In the facts of the case before the Division Bench there were eight small packets found in the trouser pocket of the accused person. The packets were containing "gard" powder. The collective weight of eight packets was found to be 1 gm 950 mg. Therefore, in the facts of the case before the Division Bench, it was held that "gard" powder which was recovered was for personal consumption of the accused. In this case

though including the bag the weight of the brown sugar is 6 gm, the case of the prosecution is that the Appellant was selling the brown sugar in a particular area where raid was conducted. Therefore, it is very difficult to accept the submission that section 27 of the said Act will be applicable. In the present case, it cannot be said that the contraband involved is of a small quantity. Under sub-clause (d) of clause (ii) of sub-section (b) of section 20, for possessing lesser than commercial quantity and more than small quantity, the punishment prescribed is of rigorous imprisonment of ten years and with fine which may extend to one lakh rupees. Merely because report of the Chemical Analyser is silent about the weight, the other evidence regarding weight cannot be brushed aside. When the weight was otherwise proved on evidence, merely because Chemical Analyser's report does not contain weight will not affect the conviction.

14. The allegation has been made regarding non-compliance with section 57 of the said Act. On plain reading of section 57 of the said Act it is obvious that the provisions thereof are directory as distinguished from being mandatory. The delay of four

days in sending the articles to Chemical Analyser cannot be said to be fatal. There may be a delay of about nine months in sending the articles to the court. However, the said delay cannot be fatal as there is hardly any challenge to the opinion of the Chemical Analyser.

15. The perusal of the judgment of the learned Trial Judge shows that the entire evidence on record has been duly considered. The learned Judge has rightly appreciated the evidence and has held that the guilt of the accused has been established. Considering the evidence on record, no fault can be found with the sentence awarded of ten years with fine of Rs.01,00,000/-.

16. The judgment will not be complete without recording appreciation for the assistance rendered by the learned Advocate who was appointed as amicus curie to espouse the cause of the Appellant.

17. There is no merit in the Appeal and the Appeal is dismissed. The Appellant to surrender to the bail forthwith.

JUDGE